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No. 99-993

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ARKANSAS,
Petitioner

vs.

FARM CREDIT SERVICES OF CENTRAL ARKANSAS, PCA; FARM CREDIT SERVICES OF WESTERN ARKANSAS, PCA; EASTERN ARKANSAS PRODUCTION CREDIT ASSOCIATION; and DELTA PRODUCTION CREDIT ASSOCIATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF AMICUS CURIAE OF THE STATES OF OHIO, COLORADO, FLORIDA, IDAHO, LOUISIANA, KANSAS, MARYLAND, MICHIGAN, MISSOURI, MONTANA, NEVADA, NEW YORK, SOUTH DAKOTA, VERMONT, AND WISCONSIN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF AMICUS INTEREST

Ohio and 14 other states support Arkansas' petition for certiorari and urge the Court to reverse the decision of the Arkansas Supreme Court. At issue is the scope of immunity

from State and local taxation enjoyed by certain federally chartered lending institutions within the Farm Credit System, the production credit associations ("PCAs"). The case presents the question whether PCAs, as "federal instrumentalities," should be granted intergovernmental tax immunities beyond those immunities which Congress expressly provided by statute. At the urging of the States and the Solicitor General, the Court in 1997 granted certiorari over the same question between the same parties, while simultaneously granting certiorari over a threshold jurisdictional question. *Arkansas v. Farm Credit Services of Central Arkansas*, 519 U.S. 1085 (1997) (granting certiorari); *see also same case* 520 U.S. 821, 824-25 (opinion of the Court per Kennedy, J.) (discussing posture of the case and noting that "[e]ntitlement to the immunity is the underlying substantive issue, were we to reach it"). Ultimately, the Court in the prior case held the Tax Injunction Act had barred the district court from hearing the case, and for that reason the Court did not reach the merits of whether the lower court had properly granted additional immunities to the PCAs. 520 U.S. 821, 832.

Now the same merits question of how much immunity PCAs should enjoy, which the Court previously found worthy of review but did not reach, comes from the Arkansas Supreme Court unencumbered by jurisdictional difficulties. For the same reasons as before, the Court should grant certiorari here.

REASONS FOR GRANTING THE WRIT

A. The Court Has Already Determined That The PCA Immunity Issue Is Worthy of Review, And The Reasons For Granting The Writ Have Not Diminished.

Congress proclaimed PCAs to be "federal instrumentalities" and expressly immunized their "notes, debentures and other obligations" from federal, State and local taxation, 12 U.S.C. 2077. But in spite of Congress's enumerated grant of immunities, the Arkansas Supreme Court held PCAs additionally enjoy immunity from State corporate income and sales taxes. That is precisely what two judges of a three-judge panel of the Eighth Circuit held in the prior case, 76 F.3d 961 (1996). From the Eighth Circuit's decision, Arkansas petitioned for certiorari. It received support from Ohio and 12 other States.

In response to that petition, the Court sought the view of the Solicitor General, who complied by filing a brief that agreed with the States both that certiorari should be granted on this issue and that PCAs were not immune from state taxation. Accordingly, in addition to pointing out that the Tax Injunction Act had barred jurisdiction in the federal district court, the Solicitor General specifically asserted that the Eighth Circuit decision "construes the Farm Credit Act of 1971, 12 U.S.C. 2077, in a manner that calls into question long-standing impositions of state taxes on production credit associations in which the federal government does not have an ownership interest." U.S. Brief (On Petition For Writ of Certiorari), No. 95-1918, at 7.[1]

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[1] Citations to the U.S. brief in Case No. 95-1918 are to the brief submitted at the petition stage. The Solicitor General also filed a brief on the merits in support of Arkansas's position.

Certiorari was then granted over the merits issues, 519 U.S. 1085 (1997), with the Court additionally requiring the parties to brief and argue the Tax Injunction Act question. Ultimately, the Court reversed on the grounds that the Tax Injunction Act barred federal jurisdiction, 520 U.S. 821, and thereby did not reach the substantive issue of tax immunity. Thereafter, the PCAs pursued their refund claims in Arkansas state courts.

Now presented in the proper posture of a state court decision, the tax immunity issue is ripe for review by this Court. The reasons for granting certiorari remain compelling.

- The Arkansas Supreme Court opinion manifests the same error as the Eighth Circuit decision in the prior case. As a result, the very same conflict arises between the Arkansas Supreme Court's decision and the judgments of courts in other States as the Eighth Circuit's decision created in the prior case. *See Columbus PCA v. Bowers*, 180 N.E.2d 1 (Ohio 1962) (statutory language conditioning broad tax immunity on government ownership constituted express consent to state corporate franchise taxation once all shares were in private hands); *Woodland PCA v. Franchise Tax Board*, 37 Cal. Rptr. 231 (App. 1964) (PCA's franchise subject to state taxation once PCA shares were all privately owned despite congressional declaration that PCA franchise is "federal instrumentality"). *Accord Baker PCA v. State Tax Comm'n*, 421 P.2d 984, 987 (Ore. 1966) (PCA conceded that "PCAs became subject to

state taxation whenever the government ownership of the stock was terminated").[2]

- The monetary stakes for the States have only increased in the interim. In seven (7) responding states, a partial and cursory survey reveals currently pending refund or reassessment claims involving PCAs or other Farm Credit System entities amounting to no less than sixteen million (16,000,000) tax dollars at issue.

- No action by Congress in the interim has clarified or altered the issues.

- Beyond the impact on State and local finances, the issue retains additional importance arising from the distortion of the competitive lending market. Special, extra-statutory tax breaks for Farm Credit System players mean an uneven playing field among themselves and with respect to competitors in the agricultural lending sector. At the merits stage in the prior case, the brief of amicus American Bankers' Association *et al.* highlighted this significant aspect of the issue.

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[2] These cases reflect what the Solicitor General in the last case justly called the "long-standing impositions of state taxes on production credit associations," but the erroneous reasoning of the Eighth Circuit in the last case and the Arkansas Supreme Court in this case appears to be infectious: amici are aware of at least two state tribunals that have immunized PCAs against corporate income or franchise taxation since the Arkansas Supreme Court decision at issue herein.

Because the Arkansas Supreme Court decision stands in conflict with other lower court decisions and presents the appropriate case to address an issue that retains its national importance, the Court should follow its prior decision to grant certiorari over the PCA immunity issue.

B. This Case Presents An Excellent Vehicle To Decide PCA Immunity And Thereby Clarify The Principles State Taxing Authorities Should Apply When Confronting A Federally-Chartered Entity's Claim Of Tax Immunity.

The Arkansas Supreme Court employed the same erroneous analysis that two of the Eighth Circuit judges adopted in the prior case. Namely, the lower court looked at Congress's designation of PCAs as "federal instrumentalities" at 12 U.S.C. 2077, and found that such status conferred broad tax immunity absent an express "waiver" by Congress. The state court adopted this theory in spite of the express grant of more limited immunity to PCA notes obligations and debentures that immediately follows the instrumentality designation in 12 U.S.C. 2077.

Just as troubling as the result itself is the absence in the Arkansas Supreme Court's opinion of any explanation about, or attempted refutation of, the objections and concerns raised by the States, by the Solicitor General, and by the non-PCA bankers in the last case. Specifically, the Arkansas Supreme Court failed to explain why the doctrine of *expressio unius* should not apply to limit tax immunities to those mentioned by Congress. Nor did the lower court offer any reason to disregard the unbroken legislative history that the reduction of tax immunities always accompanied the complete privatization of the PCAs. Pet. at 12-16; U.S. Brief (On Petition for Writ of Certiorari), No. 95-1918, at 2-4. In light of this Court's observations last time that "[t]he PCA's'

business is making commercial loans," and that PCAs' "interests are not coterminous with those of the Government any more than most commercial interests," 520 U.S. at 831, the state court ought to have explained why such factors should be disregarded in deciding the scope of intergovernmental tax immunity.

Perhaps most startling of all, however, is the apparent misappreciation the Arkansas Supreme Court showed toward the statutory analysis this Court utilized in the prior case. That analysis would, if applied to the tax immunity question, strongly militate to the contrary result to that reached below. In the prior case, this Court decided that the PCAs, "[d]espite their formal and undoubted designation as instrumentalities of the United States," did not "have or exercise power analogous to that of the NLRB or any of the departments or regulatory agencies of the United States." 520 U.S. at 831-32. That sufficed for the Court to "conclude that instrumentality status does not in and of itself entitle an entity to the same exemption the United States has under the Tax Injunction Act." *Id.* The course of the Court's analysis in this regard included explicit reference to tax immunities as well:

> The tax immunity a PCA has under §2077 is a permitted consequence of its status as a federal instrumentality. An instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes, however, without the further inference that the instrumentality has all the rights and privileges of the National Government.

520 U.S. at 829.

Yet, in spite of the relevance of this analysis for applying to the tax immunity question principles similar to those governing jurisdiction under the Tax Injunction Act,

the Arkansas Supreme Court offered absolutely no explanation why this Court's statutory analysis would not apply to the immunity question also. As the most recent and direct statement (albeit dicta) touching on tax immunity of instrumentalities, closer attention was surely due to the *Farm Credit* decision.[3]

Nor does the state court's reliance on *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) and *Department of Employment v. United States*, 385 U.S. 355 (1966) adequately respond to the Court's reasoning in *Farm Credit*. That is so, because *M'Culloch* involved bank legislation that made no mention of state tax immunity one way or the other; and *Department of Employment* held only that certain Internal Revenue Code provisions that exempted "federal instrumentalities" from state unemployment taxes applied to the National Red Cross.[4] Thus, neither case remotely

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[3] The Arkansas Supreme Court mentioned this Court's *Farm Credit* decision only once, in footnote 1, where it was referenced as part of the history of the litigation and as having decided the jurisdictional question. There was no further discussion of *Farm Credit*'s having any relevance. The Arkansas Supreme Court did cite *Farm Credit Services of Mid-America v. Dep't of State Revenue*, 705 N.E.2d 1089 (Ind. Tax Ct. 1999), a case where a state tax court declined to extend this Court's statutory analysis in *Farm Credit* to determining the tax immunity of a Farm Credit System entity (not a PCA), primarily on the gounds that it thought doing so would require overruling *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). 705 N.E.2d at 1093. But that is not so, as noted below; in *M'Culloch* there was no immunity statute.

[4] The fact that *Department of Employment* applied a statutory immunity which Congress provided for certain "instrumentalities of the United States" is easily overlooked. The discussion of the statutes is consigned to the last paragraph of the opinion, which examines the effect of a 1960 amendment to those statutes. The Court concluded that service performed for certain "instrumentalities of the United States" was intended to be exempt

explains why Congress's explicit enumeration of tax immunities at 12 U.S.C. 2077 should not be deemed exclusive.[5]

In no way can the Arkansas Supreme Court be said to have advanced the analysis of tax immunity past the point of the Eighth Circuit panel majority in the prior case. That clarification needs to be supplied by this Court just as much now as in 1997, when certiorari was granted over the same

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from state as well as federal employment taxes; in accordance with this reading of the statutes the bulk of the opinion focuses on whether the Red Cross was such an "instrumentality" for purposes of applying the statutory exemption.

[5] Likewise, the Arkansas Supreme Court's citation to two Eighth Circuit cases fails to provide an explanation. Despite broad dicta, both *Federal Reserve Bank of St. Louis v. Metrocentre Improvement Dist #1*, 657 F.2d 183 (8th Cir. 1981) and *United States v. City of Adair*,539 F.2d 1185 (8th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977), *aff'd*, 455 U.S. 995 (1982) involved immunity claims raised by entities on which Congress had expressly conferred broad grants of immunity (i.e., the Federal Reserve System and the Commodity Credit Corporation respectively), and the court considered the scope of an express statutory exception that allowed imposition of real property taxes. The appeals court decided in both instances that a special assessment against the property did not come within the real property tax exception, and therefore was barred. Thus, neither case required judicial extension of immunities beyond what the statute provided. To be sure, *Federal Reserve Bank* also engages in a separate inquiry whether the institution enjoyed an extra-statutory immunity as a "federal instrumentality," but the discussion of factors there (*e.g.*, performance of governmental functions such as creating currency) would not permit such an analysis to apply to PCAs after this Court's holding that PCA interests are "not coterminous with those of the Government any more than most commercial interests." 520 U.S. at 831.

immunity issue between the same parties. This time, the question is fully ripe for disposition by this Court.

CONCLUSION

For all the foregoing reasons, the writ of certiorari should be granted and the decision of the Arkansas Supreme Court should be reversed.

Respectfully submitted,

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